

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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NIYA KENNY, ET AL.,
Plaintiffs,

* CIVIL NO. 2:16-CV-2794
* OCTOBER 04, 2021 11:19 A.M.
* MOTION FOR SUMMERY JUDGMENT
*

vs.

* TELEPHONE CONFERENCE
*

ALAN WILSON, ET AL,

* Before:
* HONORABLE MARGARET B. SEYMOUR
* UNITED STATES DISTRICT JUDGE
* DISTRICT OF SOUTH CAROLINA

Defendants.

* * * * *

APPEARANCES:

For the Plaintiffs:

SARAH ANN HINGER, ESQUIRE
GALEN LEIGH SHERWIN, ESQUIRE
American Civil Liberties Union Fndn.
125 Broad Street, 18th Floor
New York, New York 10004

DAVID ALLEN CHANEY, JR. ESQUIRE
American Civil Liberties Union
P.O. Box 20998
Charleston, SC 29413

For Defendant Alan Wilson, et al.:

JAMES EMORY SMITH, JR. ESQUIRE
SC Attorney's General's Office
P.O. Box 11549
Columbia, SC 29211

Court Reporter:

Michele E. Becker, RMR, CRR, RPR
201 Magnolia Street
Spartanburg, SC 29306
(864) 905-8888

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produced by computer.

Michele Becker, RMR, CRR, RPR
US District Court
District of South Carolina

1 (Court convened at 11:19 a.m.)

2 THE COURT: Good morning. We're here in the case of
3 Kenny, et al, versus Wilson, et al. This is Civil Action
4 Number 2:16-2794. The Court wanted to have this hearing to
5 clarify some issues that were raised in the motions that were
6 filed with the Court. And so, first of all, I'd like to find
7 out who is representing the Plaintiffs on the line, please?

8 MS. HINGER: Good morning, Your Honor. This is
9 Sarah Hinger on behalf of the Plaintiffs.

10 THE COURT: All right.

11 MR. CHANEY: Good morning, Your Honor. Allen Chaney
12 on behalf of the Plaintiffs, though Ms. Hinger is going to be
13 handling the argument in this case.

14 THE COURT: Okay.

15 MS. SHERWIN: And good morning. Galen Sherwin for
16 the Plaintiffs also. Thank you.

17 THE COURT: All right. Anyone else on the line for
18 the Plaintiffs?

19 THE PARALEGAL: Good morning, Your Honor. I'm just
20 a paralegal with Plaintiffs under Sarah Hinger. Thank you,
21 Your Honor.

22 THE COURT: Thank you. And for the Defendants?

23 MR. SMITH: Emory Smith for the Attorney General,
24 Your Honor. And I'm the only one on line for the Defendants.

25 THE COURT: Okay. Thank you, very much. I

1 appreciate everybody being available today to go over some
2 issues in this case. And my first -- I don't think we need to
3 go into any detail about the facts because they're pretty
4 clear to the Court at this time, but my first question for
5 Plaintiff's counsel: When the Amended Complaint was filed,
6 the Amended Complaint only added G.D., I think, but it did not
7 change what the parties were asking for as far as relief. So,
8 I would like to hear from the Plaintiff with regard to the
9 Amended Complaint. Specifically, does the fact that the
10 Disturbing Schools law was amended in 2018, to render the law
11 no longer applicable to students, have any impact on the
12 Court's authority to now consider the constitutionality of the
13 former law? In other words, can the Court judge a former law
14 as unconstitutional?

15 **COURT REPORTER:** Your Honor, I'm sorry to interrupt.
16 This is Michele Becker, the court reporter in Spartanburg. I
17 am having a really hard time understanding you. You're not
18 coming through very clear on the phone, and I might need to
19 ask you to repeat the last few sentences when you were
20 quoting a document because I couldn't hear it.

21 **THE COURT:** Sure. Okay. The question to the
22 Plaintiff was, does the fact that the Disturbing Schools
23 law was amended in 2008, to render the law no longer
24 applicable to students, have any impact on the Court's
25 authority to now consider the constitutionality of the former

1 law? Can the Court adjudge a former law as unconstitutional?

2 **MS. HINGER:** Thank you, Your Honor. To the question
3 of the Disturbing Schools law, which was amended, the
4 Plaintiff claims -- the question would be whether or not the
5 Plaintiffs' claims are mute at this point following the
6 revisions to the law. And they are not because there is
7 mainly relief that is available to the Plaintiffs in this
8 case. And that's because the charges that were made under the
9 Disturbing Schools law as it existed prior to May 17th, 2018,
10 continue to exist on the records of young people and to impact
11 their lives. And that's a continuing ongoing injury stemming
12 from the unconstitutional, vague language of the statute. And
13 because that ongoing injury remains, the Plaintiffs' claim is
14 not moot, and the Court has the authority to rule on the issue
15 and to order such relief as is necessary to remedy the
16 violation of Plaintiffs' Constitutional rights.

17 **THE COURT:** I understand that, but are you asking me
18 to invalidate 420 as it applies to the enforcement prior to
19 the amendment?

20 **MS. HINGER:** No, Your Honor. Thank you. To
21 clarify, we are no longer seeking -- we recognize that there
22 is no need for the Court to enjoin enforcement of the law as
23 it existed prior. We are only seeking with regards to the
24 Disturbing Schools law. The Court order that records --
25 criminal or juvenile records generated pursuant to that law

1 prior to May, that the State be prohibited from using those or
2 relying on those records.

3 **THE COURT:** So, would that require me to rule that
4 420 was unconstitutional or not?

5 **MS. HINGER:** Yes, Your Honor. We are asking the
6 Court to declare that the language of the law is
7 unconstitutional. And, again, that would be relevant as that
8 particular statutory provision continues to remain and has
9 force and effect against it as it exists on their criminal
10 records.

11 **THE COURT:** So, you're asking me to rule the former
12 420 was unconstitutional, not as it's been amended?

13 **MS. HINGER:** Yes. That's correct, Your Honor.

14 **THE COURT:** But that's not clear in your filing.
15 And when I go back and read your Amended Complaint, you didn't
16 change your Amended Complaint to reflect that.

17 **MS. HINGER:** To the extent that -- we certainly
18 would concede we are not seeking for the Court to enjoin
19 Section 16-17-420 as it currently exists, or to make a
20 declaration as to its constitutionality.

21 **THE COURT:** All right. You mean the current one?

22 **MS. HINGER:** Yes.

23 **THE COURT:** Okay. So, can you explain to me why you
24 never sought to amend your complaint to specify that?

25 **MS. HINGER:** Yes, Your Honor. I think from the

1 Plaintiffs' perspective, the complaint and the claim of child
2 was against law Section 16-17-420 as it existed when filed.
3 And so that -- the claim itself did not change, although
4 necessary remedy was modified by the changing facts over the
5 course of the case. And so from the Plaintiffs' perspective,
6 that did not require an amendment of the particular terms of
7 the claim, although we have acknowledged over the course of
8 proceedings that we are not seeking an enjoinder of ongoing
9 enforcement under Section 16-17-420.

10 **THE COURT:** Okay. Mr. Smith, do you have anything
11 to add to that on that particular issue?

12 **MR. SMITH:** Your Honor, you've raised an interesting
13 question, and I was just trying to pull up the Amended
14 Complaint now. Obviously, I understand that the Plaintiffs
15 are no longer seeking injunctive relief as to the amended
16 Disturbing the Schools statute. And I know that they allege
17 that they are seeking retroactive relief as to the prior
18 version of the statute. And we have -- without my going into
19 it right now, as Your Honor knows, contested their right to
20 seek retroactive relief. But I think that it is an
21 interesting question here, Your Honor, in that whether this
22 Court has the authority to declare a law unconstitutional
23 that's no longer in effect and grant relief accordingly, and
24 if it cannot do so, whether this Court can grant any relief.
25 In other words, can the Court grant relief as to a law that is

1 no longer in effect and has not been in effect for
2 approximately, I think, three years now. So, I have some
3 concern about that. And if need be, I think the parties could
4 address that through short additional briefing for Your Honor.

5 **THE COURT:** All right. Mr. Smith, what about the
6 amended Disturbing the Schools law that says: After the
7 effective date of this Act, all laws repealed or amended by
8 this Act must be taken and treated as remaining in full force
9 and effect for the purpose of sustaining any impending or
10 objective rights, civil action, special proceedings, criminal
11 prosecution or appeal existing as of the second date of this
12 act?

13 **MR. SMITH:** I think it was -- I may pull up the full
14 text of that. I can right now. As I recall that language --
15 I don't have the particular language up, but I think it did
16 allow for any proceedings under the old law to continue. I
17 don't know that we have -- so it did say that, in so many
18 words.

19 **THE COURT:** Because I was reading right from the
20 statute. So, if the State specifically left out that
21 language, I put that language in, it seems that it would
22 have -- the Court would have jurisdiction to address that.

23 **MR. SMITH:** Well, I understand your point, but I
24 think it would be -- possibly so, Your Honor, but it's not --
25 while it preserves those matters that may be pending, the law

1 itself is not enforceable as to any new proceeding. And so I
2 think there's still some question there about whether the
3 authority of the Court to declare a prior law
4 unconstitutional, I don't think -- the Plaintiffs have said
5 they don't need an injunction as to the new law, and this is a
6 part of the new law. It simply preserves those aspects of the
7 former provision. And I'm not sure whether that's enough to
8 authorize this Court to, in effect, declare the prior law
9 unconstitutional.

10 **THE COURT:** Another issue to consider is that the
11 prior law was not repealed but only amended. So, it's not
12 like it was taken off the books. It was not appealed. It was
13 not appealed. It was just amended.

14 **MR. SMITH:** Well, Your Honor, I think that that
15 still has the same effect. It was a virtual complete
16 rewriting of the law that took out any charge against a
17 student, unless the student made a -- physically harmed
18 personnel or another student, or made a threat of physical
19 harm. So, it was -- in effect, it replaced the new with the
20 old -- I mean, the old with the new.

21 **THE COURT:** But it also stated that the old would
22 stay in effect as full force and effect for the purpose of
23 sustaining criminal prosecution.

24 **MR. SMITH:** I believe it did so, Your Honor.

25 **THE COURT:** So, this issue goes to the entire

1 sub-class, and then with no argument at that time that it was
2 an inappropriate sub-class.

3 **MR. SMITH:** I'm sorry. Which sub-class, Your Honor?
4 Are you talking about the class of all students?

5 **THE COURT:** The class of all elementary and
6 secondary students in South Carolina for whom a record exists
7 related to being taken into custody, charges filed,
8 adjudications, dispositions under 420.

9 **MR. SMITH:** I don't believe -- I don't believe we
10 argued that the Court would lack authority due to the
11 amendment. We did argue that the class writings expungement
12 relief, that the Court lacked authority under the
13 circumstances and facts of this case otherwise to grant
14 retroactive expungement across the sub-class.

15 **THE COURT:** But that wasn't a jurisdictional
16 argument, correct?

17 **MR. SMITH:** Well, if -- not based upon the pleading
18 itself. But we contended that the Court lacked that
19 authority. So, I suppose to that extent it would be
20 jurisdictional. But it was not tied to the amendment. It was
21 just that class-wide injunctive relief is inappropriate.

22 **THE COURT:** Okay. Ms. Hinger, do you have anything
23 else to add to that?

24 **MS. HINGER:** Yes, Your Honor. There's just one
25 other point in addition to as you mentioned the continued

1 statutory language stating that the prior law would remain and
2 that facts for purposes of ongoing enforcement. And I think
3 that there are examples in the case law of Courts ruling on
4 the basis of the Constitutionality of a law that has since
5 been amended in the *habeas* context. And that comes up also in
6 some of the cases that were cited where Courts have granted
7 expungement in the exceptional circumstance, such as Your
8 Honor found in this case where a record exists of a conviction
9 under a law that was subsequently determined to be
10 unconstitutional. And Your Honor's opinion is on the record
11 at ECF 185, that the leading case on that cited from the
12 Fourth Circuit is *Allen v Webster*. It's 742 F.2d 153.

13 **THE COURT:** Okay. Thank you. With regard to the
14 class representative, G.D. was in the tenth grade in 2019.
15 So, I'm assuming for -- it's possible he could have graduated
16 in 2021. Can he still be the class representative for the
17 former Disturbing Schools Rule sub-class? I mean, for the --

18 **MS. HINGER:** Yes. Apologies. Yes, Your Honor.
19 This is -- sorry.

20 **THE COURT:** I'm sorry. The enforcement class. I'm
21 sorry. The enforcement class.

22 **MS. HINGER:** Yes. This is Sarah Hinger for the
23 Plaintiff. So, importantly, Your Honor, in considering class
24 certification, also did identify correctly that in our opinion
25 that the injuries involved in this case are a type that are

1 likely to be repeated, and that the course of this case,
2 because of the nature of school students moving through the
3 education system was such that it would be a transitory harm
4 whereby, once the class was certified with a representative,
5 the fact that they might then move through the education
6 system through the course of the case does not actually impact
7 their ability to continue to stand as the class
8 representative.

9 **THE COURT:** Okay. So, the class representative for
10 the class regarding enforcement of disorderly conduct, has
11 D.B. graduated, or does it make a difference?

12 **MS. HINGER:** Your Honor, it does not make a
13 difference. Our understanding is that D.B. was set to
14 graduate, although we would need to confirm whether, in fact,
15 he has officially graduated.

16 **THE COURT:** D.S. was in high school in 2016. So,
17 D.S. may have graduated in 2021 too if he's charged with the
18 former Disturbing Schools, and if he was a freshman in
19 2015/2016. So it's possible that S.P. could have graduated.
20 Could he still be a representative for the disorderly conduct
21 sub-class?

22 **MS. HINGER:** Yes, Your Honor. So, for the same
23 reasons, because of the transitory nature of the injury to
24 school students in this case, they can still remain class
25 representatives. Additionally, Your Honor, we do have an

1 organizational plaintiff in this case with ongoing standing to
2 represent both accused members and its own interests as an
3 organization. And that's the Carolina Youth Action Project.

4 **THE COURT:** All right. Mr. Smith, do you have
5 anything that you want to add on this issue with regard to the
6 representatives?

7 **MR. SMITH:** Well, Your Honor, I was trying to pull
8 up the class documents. I wasn't really -- didn't review the
9 class documents before this hearing today because I was
10 thinking about it being more in terms of summary judgment.
11 But I believe we did raise the question in our class filings,
12 and I believe we argued that because of the graduation and the
13 departure of the Plaintiffs from the school system, that there
14 would not be a Plaintiff left who could carry forward the case
15 who could represent the class.

16 And I believe that the Plaintiffs argued and may
17 have cited some case law that they could. I have not reviewed
18 that case law since then, but to the extent that we raise the
19 defense that a class representative has to have an active
20 stake in the litigation, be still in the school system, meet
21 the requirements for standing, then we would maintain that
22 defense now.

23 **THE COURT:** So, Mr. Smith, what about the *Sosna*
24 case, the Supreme Court Case, *Sosna versus Iowa, at 95 S Ct.*
25 *553*?

1 COURT REPORTER: I'm sorry. What was the name of
2 that case again?

3 THE COURT: *S-o-s-n-a versus Iowa, 95 S Ct. 553.*

4 MR. SMITH: On what point is that case -- Your
5 Honor, what issue is that case?

6 THE COURT: Okay. One second. I'll get it for you.

7 The Supreme Court in that case: The controversy may
8 exist between a main defendant and a member of the class
9 represented by the main defendant, even though the claim of
10 the main defendant has become moot.

11 MR. SMITH: Yeah. All I can say, Your Honor, is
12 that, again, I have not reviewed all those class filings to
13 date because I didn't -- maybe I should have, but I didn't
14 anticipate we'd be getting into those class issues today.

15 But just as I said, I think we raised the defense
16 that the action would be mooted, or it would be inappropriate
17 for people to carry on as class representatives when they were
18 no longer a part of the class itself, when they had left the
19 school system. I believe the Plaintiffs had some arguments to
20 the contrary. And with the -- and, in fact, however, they did
21 bring in another class representative, D.D., to represent the
22 class. The Carolina Youth Action Project, Girls Rock, is a
23 Plaintiff and continues to be a Plaintiff, however they are
24 not the class representative. So, their continuation in the
25 case is not as a representative, it's just as a named

1 plaintiff.

2 **THE COURT:** Okay. Thank you, very much. Anything
3 else on that issue?

4 **MS. HINGER:** Nothing further at this time, Your
5 Honor.

6 **THE COURT:** So, let me go to this facial versus
7 as-applied standard. Does it make a difference if the Court
8 capitalizes the challenge to either statute as facial versus
9 as-applied? The challenge to the former Disturbing Schools
10 statute appears to be facial with no as-applied language used.
11 However, the former Disturbing Schools sub-class is limited to
12 students. Just to be clear, Plaintiffs are not asking the
13 Court to invalidate as unconstitutionally vague the former
14 Disturbing Schools law as to everyone other than individuals
15 who are charged under the law when they were primary or
16 secondary students; is that correct?

17 **MS. HINGER:** Your Honor, we do believe that that
18 ruling would be sufficient to redress the injuries that
19 Plaintiffs continue to face. We do think, first, that the
20 context of rules and the application of both of the challenged
21 laws to school students is particularly relevant to the
22 Court's analysis here. With regards to the former Disturbing
23 Schools law, we do believe that the language was facially
24 vague and applied including to college students, and as far as
25 an apartment complex owned by a college. And for that reason

1 we believe that -- and we maintain that the language of that
2 law is vague beyond its context of application to elementary
3 and secondary school students, and that the Court could find
4 the law unconstitutionally vague on its face. However, should
5 the Court reach a narrower conclusion that the law is vague
6 as-applied to elementary and secondary school students that
7 would satisfy the remaining injury and relief requested by the
8 Plaintiffs.

9 **THE COURT:** So, the sub-class whom expungement would
10 apply is limited to students, correct?

11 **MS. HINGER:** That is correct, Your Honor.

12 **THE COURT:** But your arguments as to why the former
13 law is unconstitutional isn't similarly limited; is that what
14 you're saying?

15 **MS. HINGER:** That is correct, Your Honor. We argue
16 that the prior Disturbing Schools law is vague even beyond
17 this application to elementary and secondary school students,
18 but the relief that Plaintiffs seek is specific to the
19 elementary and secondary school students.

20 **THE COURT:** So, I just want to find out, is everyone
21 in agreement then that the challenge to the disorderly conduct
22 law is a hybrid, facial and as-applied challenge, or does it
23 make a difference?

24 **MR. SMITH:** Your Honor, this is Emory Smith for the
25 State, and respectfully are not in agreement with that. We

1 believe that these are facial challenges, and that although
2 they allege that they are making as-applied to school
3 children, this is a huge class of over 750,000 students,
4 15 percent or more of the entire population of the state. And
5 although they allege that, the contentions about the statute
6 are purely facial, and that based upon the terms that they
7 contend are vague.

8 The law is that as-applied -- this was in our
9 memoranda -- that as-applied challenges are directed to
10 particularized facts, specific -- generally specific people or
11 specific circumstances. And instead, this is a broad brush
12 class that includes, as I said, a huge student population.
13 And under current figures for the last year, only 1,000,
14 one-seventh of one percent of those were charged, and the
15 circumstances may vary. So, it's really not appropriate for
16 an as-applied challenge.

17 Now, having said that, if it is a facial challenge,
18 it does make some difference because facial challenges are
19 looked upon with disfavor. And a reason is the absence of
20 particular facts in a facial challenge. And so if this is
21 facial as this appears to be, then this would be a further
22 constraint on the Court as to overturning the statute because
23 they are looked upon with disfavor. However, if the Court
24 views this as as-applied, we believe the result is the same
25 for the reasons we've discussed in our memoranda. We believe

1 that the statutes are not vague regardless of whether this is
2 as-applied or facial.

3 THE COURT: Okay.

4 MS. HINGER: Yes. Thank you. Apologies, Your
5 Honor. There's a couple of points I wanted to address in
6 response. First, the standard applied to facial challenges
7 and the relevance of the outside context in this case. Even
8 if the Plaintiffs' claims were construed as a facial
9 challenge, the relevant point here is that the Court and the
10 Fourth Circuit have held that the Plaintiffs have standing to
11 bring a facial challenge to the Disturbing Schools law. And
12 where a facial challenge is proper, the same scrutiny applies
13 to a law that abuts each in-expression to a law that imposes
14 criminal penalties, and to a law that applies to young people
15 in the context where they have diminished culpability and an
16 under-developed sense of maturity. All of those things apply
17 equally where a facial challenge is appropriate.

18 The case law cited, particularly the *Schleifer* case
19 cited -- *Schleifer*, excuse me, by Defendants, goes to the
20 analysis of whether or not a plaintiff can appropriately bring
21 a facial challenge. That question has been decided both by
22 this Court and the Fourth Circuit in this case. And where a
23 facial challenge is appropriate, the same standards of
24 searching scrutiny applies.

25 Second point I wanted to address is with regards to

1 the Disorderly Conduct law, and the particular importance of
2 the as-applied context in this challenge. We are challenging
3 the law as it applies to elementary and secondary school
4 students, children in the school setting. And the conduct
5 here is analogous, I think, to the Fourth Circuit's decision
6 in *Lanning*. That's 723 F.3d 473, where in that case the Court
7 found that the facts of the case indicated the real risk that
8 a disorderly conduct law in this particular context of its
9 application in a sex sting of gay men could be used to
10 arbitrarily and discriminatorily be enforced against gay men.

11 Similarly here, the particular context of
12 enforcement makes clear the ways in which the law is
13 unconstitutionally vague and can and does result in arbitrary
14 and discriminatory enforcement in this specific context. Most
15 importantly in the school context, the law is applied to
16 children, who as the Fourth Circuit found are in many ways
17 disorderly and boisterous by their own nature. And as the
18 undisputed record shows, school codes of conduct identify that
19 disorderly, boisterous and disruptive conduct by students is
20 often addressed with as little as a verbal reprimand in
21 schools.

22 However, when we apply the disorderly conduct law in
23 the school context, there is no language and no objective
24 standard in the law to understand what should differentiate
25 disorderly or boisterous conduct that's handled by schools on

1 a regular basis from disorderly or boisterous childhood
2 conduct that should be subject to an arrest. And that's the
3 fundamental problem of vagueness that the Plaintiffs argue in
4 this case why it is important and relevant that the
5 application context and the as-applied challenge here.

6 **MR. SMITH:** Your Honor, Emory Smith, if I may
7 respond. Plaintiffs -- and this is, I think, with their
8 argument and my response, we're getting a little beyond what
9 Your Honor's question was. But I respectfully would like to
10 address it. And they've brought up that in their filings that
11 the school disciplinary codes sometimes include just a
12 disciplinary level of offense for disorderly conduct, or words
13 to that effect, and that it may be a fairly light disciplinary
14 consequence.

15 Well, the fact that a school chooses to do that does
16 not make the criminal statute vague. A school could in a
17 disciplinary policy say, for example, that fights that occur
18 on school grounds if ended quickly with the intervention of
19 school personnel shall only result in a one-day suspension.
20 Whereas, fighting on the school grounds could potentially be
21 not only disorderly conduct, but also assault and battery.
22 So, the fact that they might choose hypothetically to make
23 fighting, give it just a mild disciplinary consequence, does
24 not make the criminal laws themselves vague. It's the
25 school's choice to do what they have done, but it doesn't make

1 vague the criminal laws. So, Plaintiffs' argument we believe
2 is fallacious in that respect, Your Honor.

3 THE COURT: Okay.

4 MS. HINGER: I suppose just to further respond, Your
5 Honor, I think the assault and battery law is not in question
6 here and its terms, but the problem with a criminal law that
7 imposes criminal penalty beyond any lesser penalties of a
8 school rule is that the law itself does not provide any
9 definition or objective way to determine what behavior
10 constitutes disorder or boisterousness.

11 As outlined in Plaintiffs' memorandum in support of
12 their Motion for Summary Judgment, what constitutes
13 boisterousness or disorder is in every instance dependent on
14 the subjective judgment of the person making the enforcement
15 decision. There is nothing in the law that can objectively
16 guide that determination. And moreover, in this case First
17 Amendment protected conduct unlike physical fighting is
18 directly implicated as numerous cases have held. Students
19 engage in protective speech and expression importantly as a
20 foundation of democracy as a part of attending schools. That
21 was recognized by the Fourth Circuit in this case as well.
22 And you've seen that the laws challenged in this case are
23 applied to students criticizing police, and can also extend to
24 behaviors and discussions where they're described merely as
25 being boisterous, which could equally describe robust --

1 (Phone Conference Interruption) -- that children engage in and
2 are protected in the school context.

3 **THE COURT:** Okay. Thank you. All right. So just
4 let me make sure I'm clear on this. Are the Plaintiffs asking
5 the Court to invalidate the Disorderly Conduct Law as to
6 primary and secondary children while they're attending school,
7 or invalidate it as to primary and secondary children with no
8 limitations?

9 **MS. HINGER:** Your Honor, while attending school.

10 **THE COURT:** Okay. So, in your class certification
11 it's limited to school attendance, but in your substantive
12 motions I don't see that same limitation, so I wanted to be
13 clear about that.

14 **MS. HINGER:** Thank you, Your Honor. Yes. To
15 clarify, we would be seeking relief for students as they
16 attend school.

17 **THE COURT:** Okay. So, with regard to -- what
18 exactly does this Court's order have on this day as to the law
19 enforcement Defendants? Procedurally, what would have to
20 happen with regard to these Defendants?

21 **MS. HINGER:** Your Honor, I don't believe anything in
22 particular would need to happen. An order enjoining
23 enforcement in this case would presumably apply to those
24 defendants as with anyone in the state. So, Plaintiffs
25 position is that nothing in particular would need to happen

1 regarding -- regarding those defendants.

2 **MR. SMITH:** Your Honor, this is Emory Smith. The
3 order granting a stay as to the Law Enforcement Defendants
4 simply said that they agree to abide by any order or other
5 precedent of this Court and the U.S. Court of Appeals or the
6 Fourth Circuit regarding the constitutionality of the statutes
7 and their enforceability. And the Plaintiffs agree that they
8 should not be obligated to further defend this action or file
9 any further responses.

10 **THE COURT:** Okay. Thank you. I appreciate that.

11 All right. So, is there anything else that you
12 would like to put on the record, either Ms. Hinger or
13 Mr. Smith, with regard to your Motion for Summary Judgment
14 that you want to emphasize at this point in time? I'll let
15 Ms. Hinger start, and then, Mr. Smith, you can follow.

16 **MR. SMITH:** Well, Your Honor, my argument was on the
17 substance of the motions, was going to be based upon the
18 filings of the parties. The only -- and I can go through all
19 of that if Your Honor would like to hear that. The only thing
20 that I was really going to address that was not already
21 briefed is that -- let me find it here. The Plaintiff -- in
22 our filings we cited a number of examples from the incident
23 reports that the Plaintiffs themselves filed showing clearly
24 criminal conduct by the students referenced in those incident
25 reports. And, in fact, the incident reports and declarations

1 regarding the Plaintiffs' own conduct we believe falls within
2 the criminal ambit of these laws. And we discuss that in our
3 filings. But the Plaintiffs say that their point is not that
4 the laws can be applied to criminal conduct. It's that the
5 students can't tell what conduct is prohibited. And we
6 believe that they can for the reasons that we pointed out in
7 our briefing. We've gone back and forth with Plaintiffs over
8 it. They have their arguments; we have ours. We believe that
9 it is quite clear that the -- there are built-in restraints in
10 the Disturbing -- the former Disturbing the Schools law, that
11 it has to interfere with the learning environment, and has to
12 be willful or unnecessary. And that under case law also
13 fighting words, it has to be fighting words of verbal conduct
14 or yelling that would make them subject to the Disturbing the
15 Schools law. And so these are limitations that are inherent
16 in the law and case law. And so they apply here and provide
17 guidance.

18 And then as to the Disorderly Conduct statute, it's
19 disorderly or boisterous conduct, those are terms of common
20 meaning. Plaintiffs have said, in effect, however, that the
21 boy's threats are nothing really to distinguish that from pep
22 rallies. I respectfully believe that any person of reasonable
23 intelligence or understanding, including a child, would know
24 the difference between a pep rally and boisterous conduct that
25 was disturbing to the school environment that was disorderly.

1 And case law does not indicate any confusion of the Courts
2 over such terms, and we have pointed out numerous cases in
3 which similar terms have been sustained, particularly
4 disorderly. There are disorderly conduct statutes, breach of
5 peace statutes that have been widely sustained.

6 So, that was the only point other than that I wanted
7 to add with regard to their reply brief that is not already
8 addressed, which is that they acknowledge that the statutes
9 reach criminal conduct. They contend that, however, that the
10 students can't tell the difference between criminal and
11 noncriminal. And we believe that they can with the
12 constraints on the application of the statutes by case law and
13 the incident reports themselves.

14 One other point I would like to make is, I don't
15 think that -- I'm not sure whether I wrote this, but there has
16 been -- these laws have been in effect for decades. The
17 former Disturbing the Schools law for nearly a century, I
18 think 99 years before the 2018 amendment. The Disorderly
19 Conduct statute I think has been in effect for 52 years. And
20 no court of this State, no Federal Court in all those many
21 many years has found either of these statutes to be
22 unconstitutional. And the fact that so few students are now
23 charged under these laws shows that there is not a difficulty
24 in understanding or application of these laws in the school
25 environment.

1 I'll be glad to discuss our filings in more detail,
2 but really our positions are set forth in there. If you would
3 like to hear more, I'll be glad to. But, otherwise, these are
4 two particular points that we wanted to address.

5 **THE COURT:** Okay, Mr. Smith, thank you, very much.
6 Your brief was very thorough and very helpful to the Court.
7 So, I don't really need anything in addition at this time. I
8 appreciate your efforts.

9 **MR. SMITH:** Thank you, Your Honor.

10 **THE COURT:** Ms. Hinger, do you have anything you
11 want to say with regard to your motion?

12 **MS. HINGER:** Thank you, Your Honor. Yes. I do
13 think that our arguments are set forth in our briefs and our
14 response to the Defendants arguments as well.

15 I just wanted to point out here -- well, first, to
16 clarify, I don't think we would construe our position as
17 conceding that there is specific criminal conduct that is
18 appropriately covered under the law. The law in our position
19 contains no standard to determine what should be characterized
20 as criminal conduct. But what I wanted to address here was
21 the point that students are arrested, and that the laws have
22 been in place over a number of years. And this is more than
23 an academic argument about the language of these laws.

24 What the records show is that in the last five
25 years, 5,000 young people have been charged with disorderly

1 conduct in South Carolina. Over 70 percent of those charges
2 came from school-based arrests. So, these laws are a
3 substantial driver of harmful context -- contact with the
4 Juvenile Justice system. In South Carolina we've seen the
5 impact on students of arrests and charges, even when those
6 charges are dropped under these laws. To take the example,
7 our Plaintiff, Niya Kenny, who witnessed a fellow classmate
8 being ripped from her desk and physically restrained when she
9 was arrested for violating the Disturbing Schools law.
10 Ms. Kenny as a result of speaking out in defense of that
11 student was herself handcuffed in front of her classmates, and
12 her teachers, escorted out of the building and into a paddy
13 wagon, taken to an adult detention center where she sat for
14 the afternoon terrified of what would happen to her. She was
15 so traumatized that she couldn't complete her education and
16 ended up receiving a GED rather than return to her high
17 school, to her friends, to have that sense of achievement.

18 Other students report that after receiving a
19 criminal charge, they were disciplined more harshly and
20 referred to alternative school settings where they couldn't
21 even access the course requirements necessary to graduate from
22 school. They were denied free lunch and transportation
23 services that they were entitled to under federal programs for
24 students. And other students were denied the support services
25 that they were supposed to receive as students with

1 disabilities and, instead, criminalized under these laws.
2 They, in addition to the stress and worry, encountered real
3 financial hardship, as well as the potential negative impacts
4 of an ongoing criminal record. So, these are all real and
5 serious injuries that young people in South Carolina have
6 experienced and continue to experience.

7 And the last point I just want to emphasize is, that
8 because of the very vague nature of the laws and the
9 requirement for subjective determinations in their
10 enforcement, discriminatory application is encouraged. And
11 what that means, unfortunately, is that black students in
12 South Carolina are overwhelmingly disproportionately impacted
13 by these negative impacts of the law. The undisputed record
14 in the case shows that black students are over six times as
15 likely as their white classmates to be charged with the
16 criminally disorderly or boisterous in some places. That's
17 even further disparate in Greenville County. Students are 14
18 times more likely to be charged. And similarly under the
19 Disturbing Schools law, black students were about four times
20 as likely across the State as their white classmates to be
21 charged with these offenses.

22 So, I just want to conclude by emphasizing the real
23 harmful and negative impact that these unconstitutionally
24 vague laws have on the lives of students in South Carolina.
25 And for that reason we're asking that the Court grant the

1 Plaintiff's Motion for Summary Judgment and issue the relief
2 requested in our Amended Complaint.

3 THE COURT: So, let me ask this --

4 MR. SMITH: I'm sorry. Go ahead, Your Honor.

5 THE COURT: Okay. Let me ask this question: Since
6 Defendant is correct that *City of Landrum* and *In re Amir*
7 qualify application of the laws, do you maintain that the laws
8 are unconstitutional even with the guidance in these cases?

9 MS. HINGER: Yes, Your Honor. We do.

10 So, in the first instance, we would say that these
11 laws do not create a sufficient limiting instruction. In the
12 first place, the *Amir* case as it relates to the Disturbing
13 Schools law, the Fourth Circuit here has previously held that
14 this law doesn't create a limiting construction that would
15 foreclose the Plaintiffs' claim. In fact, that case used the
16 term "disturbing learning environment" exactly one time in the
17 context of its discussions of the law's overbreadth. The
18 Court in *Amir* did not reach the question of vagueness and did
19 not in any way construe a limiting construction that would
20 address the law's vagueness. But moreover, even if the Court
21 had attempted to do that, its limiting construction failed.
22 As the Supreme Court said in *U.S. v Johnson*, the failure of a
23 limiting construction to confine enforcement may be evidence
24 of a law's vagueness.

25 Here we have opinions which state and remain

1 unreversed that regardless of whether a student or faculty are
2 present, that the Disturbing Schools law can be enforced, and
3 that the law is without limitation to the time of day or year
4 when school is in session.

5 So, that evidence in addition to facts such as the
6 application of the law in a parking lot of a college-owned
7 apartment complex make clear that the law certainly has not
8 been merit, or if it had, such a merit in construction has
9 failed to limit its application to actual disruption.

10 But beyond that, finally, to conclude, a limit to
11 disturbing the learning environment would not sufficiently
12 hear the vagueness of the law as the Plaintiffs' arguments
13 have set out. What constitutes disturbing by a student in a
14 school is not sufficiently clear and remains necessarily a
15 subjective judgment just as the term to be annoying in
16 *Cincinnati V Coates* was found by the Supreme Court to rely
17 solely on the subjective determination of a police officer
18 whether a student's disturbing -- is disturbing in the school
19 context would be unconstitutionally vague.

20 And if I can turn just for a moment, Your Honor, to
21 the *Ferret* decision as well. While there is no dispute that
22 the use of profanity or curse words is protected by the First
23 Amendment from criminal penalties unless it constitutes
24 fighting words, and that the South Carolina Supreme Court had
25 likewise held that to be the case, the problem when the

1 disorderly conduct law is applied in a context of schools to
2 students, is that that limiting construction is not followed
3 and hasn't applied in schools.

4 We've seen in numerous instances the use of a curse
5 word cited as the basis for arresting and charging a student,
6 including an instance where the officer told the student that
7 it was illegal to curse in public. Moreover, even if those
8 terms themselves were not found to be vague in the law, and we
9 argue that they are, the disorderly conduct law beyond this
10 fails to indicate what type of behavior would need to
11 accompany those words in order for them to constitute fighting
12 words, particularly in the education context and uttered by a
13 student. And second, the remaining language of the law
14 "disorder" and "boisterousness" further can be applied and
15 construed to reach protective speech and expression. And so
16 for all of those reasons, we similarly maintain that the
17 *Ferret* decision is not dispositive in the same way, but the
18 *In re Amir* decision is not dispositive of the claims in this
19 case.

20 **MR. SMITH:** Your Honor, Emory Smith. If I may
21 respond. There are a number of points that -- and I'll take
22 the last ones first about the limiting instruction.

23 I think it is very clear in the *Amir* decision, the
24 *Surat* decision and the others cited, that verbal remarks can
25 not be criminally punished except where fighting words. And

1 that would include yelling in the cases that I referenced.
2 And it's very clear. I'll read you from the -- if you don't
3 mind, from the *Amir* decision. It says -- this was regarding
4 the Disturbing the Schools law. And although it was the
5 context of an over breadth challenge rather than vagueness,
6 the Court's limitations are not limited to that. It says:
7 The statute does not explicitly prohibit any type of gathering
8 or expression except those which disturb the learning
9 environment in South Carolina schools.

10 That's clear. That's a clear limit. And then it
11 says: Finally, the statute is limited in the type of conduct
12 that may be punished. The disturbance or interference is
13 required to be done willfully or unnecessary. So, therefore
14 the limitation is that it must willfully or unnecessarily
15 disturb the learning environment.

16 And it's also clear from the *Surat* decision and
17 others that fighting -- that verbal conduct other than
18 fighting words cannot be prohibited. These are limitations
19 that the Court has found in the statute, and so they apply
20 here.

21 They -- I referenced one case about an incident
22 report about curse words. The fact that a law enforcement
23 officer may have misapplied a statute does not make it vague.
24 The *Martin* case that we've cited said, and I have this quote
25 in our brief, "A difference of opinion among judges of law

1 enforcement does not make a statute unconstitutionally vague."
2 Of course, as Your Honor knows, and as the Plaintiffs'
3 attorneys know, people are sometimes charged under not only
4 these statutes but others, and after review it's determined
5 that the charges should be dismissed. And that happens. But
6 that -- the dismissal does not mean that the statute itself is
7 bad or that there's a problem with law enforcement, or that
8 there is a problem here with vagueness. And we pointed out
9 report after report after report, including some of those
10 cited by Plaintiff in part, but not in full, that show very
11 clear criminal conduct, and that enjoining these laws would
12 remove a tool of law enforcement that has been applied.

13 Just two other points briefly. This is -- we
14 addressed the alleged disparity and enforcement as to numbers,
15 as to African-American students versus other students.
16 Plaintiffs cite the numbers, but they provide no evidence that
17 there is a racial animus, discriminatory intent associated
18 with it, or that it has anything to do with their vagueness
19 claim. It's just a raw statistic that proves nothing, and
20 they made no claim of discrimination in their Amended
21 Complaint. So, we don't know what the reasons for that --
22 what the reasons are for that. They don't explain it. And so
23 it's just speculative and not rooted in any allegations in the
24 complaint.

25 And finally, going back to what Your Honor brought

1 up at the beginning of the hearing today when you mentioned
2 the fact that the Disturbing the Schools statute had been
3 amended, and what the Plaintiffs were asking this Court to do,
4 and what the Court could do. I pulled up the Amended
5 Complaint. And although the initial parts of the Amended
6 Complaint refer to the amendment in 2018 that -- as
7 eliminating the need for injunctive relief as to the
8 Disturbing the Schools law, the prayer for relief at the end
9 was not apparently amended, and they ask that the Disturbing
10 the Schools statute be declared unconstitutional, but it
11 doesn't say which one, and ask that it be permanently
12 enjoined, but it doesn't say which one. And so that is -- the
13 prayer for relief does not reflect the fact that the law was
14 amended in 2018, and does not reflect the initial parts of the
15 complaint. And as I said and as I think Plaintiffs agree,
16 they're not asking the Court to enjoin the law, the current
17 law, and they're not asking that the current law be declared
18 unconstitutional. They are maintaining their request for
19 retroactive expungement, and we disagree with that.

20 And I would -- we haven't argued about expungement.
21 I requested in our filings that if the Court -- although we
22 believe the law should be upheld, if the Court determined that
23 they are invalid, we would ask to be further heard on
24 expungement, particularly, Your Honor, in these incident
25 reports that we cited showing clearly criminal conduct on

1 multiple occasions. To grant retroactive expungement relief
2 would wipe out any convictions of those people for that
3 conduct or any other conduct. And that really goes more to
4 the practical effect of this. We've given legal reasons
5 regarding expungement in our briefings, and I won't go over
6 all of that now. But we would just ask for the opportunity to
7 be heard should that be necessary before any such relief were
8 granted.

9 That's all I have to say, unless Your Honor has any
10 questions.

11 **THE COURT:** All right. Thank you, very much.

12 **MS. HINGER:** Your Honor, this is Sarah Hinger again
13 for the Plaintiffs.

14 If I could just point out briefly in response, I
15 think all of these points are addressed in our briefing, but I
16 did want to note that on the question of expungement and
17 available remedies, the Court has addressed this issue. The
18 Court's order is available at ECF 185, which we refer to the
19 parties' relevant briefing on the issue. And as set forth in
20 our briefing and in argument today, that the request for
21 injunctive relief against the ongoing use and effect of
22 criminal records generated pursuant to unconstitutionally
23 vague terms, I think the record stands for itself in
24 demonstrating the ways in which these laws are and can be
25 applied in overly broad ways. And as the standard of

1 vagueness makes clear, a law is unconstitutionally vague if it
2 fails to provide notice to the ordinary person, in this case a
3 school child, of what they should do to comport themselves
4 with the law and avoid criminal prosecution. And separately
5 and independently, if it allows or even encourages
6 discriminatory enforcement. Certainly the records show that
7 these laws make that a possibility at the very least. And it
8 is directly relevant, their application, and disparate
9 application to black students as well as to students with
10 disabilities in this case, and to students who are engaged in
11 First Amendment protected conduct. I think the remaining
12 issues are addressed in our brief.

13 **THE COURT:** All right. Thank you, very much. I
14 don't have any additional questions. I appreciate you being
15 available today to talk about this and go over some questions
16 the Court had, and also point out issues you want the Court to
17 look at with regard to your Summary Judgment Motion. So,
18 unless you have anything else, I think that will be it.

19 **MR. SMITH:** Thank you, Your Honor. I appreciate you
20 giving us this time today.

21 **THE COURT:** All right. Thank you, very much.

22 **MS. HINGER:** Thank you, for the Plaintiffs. Thank
23 you, Judge.

24 *(Court adjourned at 12:29 p.m.)*
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CERTIFICATE

*I, Michele E. Becker, certify that the foregoing is
a true and correct transcript from the record of the
teleconference proceedings in the above-entitled
matter to the best of my ability.*

/s/ Michele E. Becker

Date: 12/29/2022

Michele Becker, RMR, CRR, RPR
US District Court
District of South Carolina